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CHILD CUSTODY EVALUATIONS: SOCIAL SCIENCE AND PUBLIC POLICY: MANDATED CUSTODY EVALUATIONS AND THE LIMITS OF JUDICIAL POWER

NAME: Mary E. O'Connell

BIO: Correspondence: m.o'connel@neu.edu

Mary E. O'Connell is a professor of law at Northeastern University School of Law in Boston, Massachusetts, where she heads the family law program. Her research and scholarship span a broad spectrum of practical family law issues, many with an interdisciplinary focus. During the academic year 2006-2007, she was a Visiting Scholar at the University of Massachusetts Medical School, where she worked with the professional psychologists and social workers of the Child and Family Forensic Center. Along with Professor J. Herbie DiFonzo of Hofstra Law School, she is also a coauthor of AFCC's 2006 report on needed reforms in family law education.

HIGHLIGHT: Kelly and Ramsey are clearly correct that a shift from a "how to" approach to custody evaluations to one that asks the more fundamental question "why" is long overdue. However, in addition to assessing the efficacy of custody evaluations (which Kelly and Ramsey propose), the legal system must also clarify the justification for imposing this extensive--and often expensive--intrusion into the privacy of parents. Three possible justifications for these intrusions are examined in this article: privilege, harm, and voluntariness. Is divorce a privilege, rather than a right, and can qualifications (including intrusive and expensive ones) be attached to requesting that privilege? Are custody evaluations instead justified as a means of avoiding harm to children? If a harm justification is asserted, exactly what harm do evaluations prevent, and how do they accomplish this harm avoidance? Finally, given the high value placed on parental cooperation by the family courts, is it simply too perilous for a parent to oppose a custody evaluation if one is suggested, either by the other parent or by the court? If so, are consents to custody evaluations truly voluntary?

Keywords: *custody evaluation; voluntariness; harm; privilege; coercion; checks and balances*

TEXT:

[*304] I. INTRODUCTION

In *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments,* Robert Kelly and Sarah Ramsey make a crucial and long overdue contribution to the custody evaluation literature and, indeed, to the family court literature as a whole. In their article, Kelly and Ramsey deftly shift the focus from the "how to" questions that have monopolized the custody evaluation literature to date and ask instead the central, inexplicably ignored "why" question. That is, why do we have child custody evaluations at all? Where did they come from, what are they supposed to do, and do we have any proof that they are actually serving their (unarticulated) purpose? After posing these questions, Kelly and Ramsey set out seven testable hypotheses which, they argue, will help to provide the missing "systems-level outcome assessments." [n1]

Hopefully, Kelly and Ramsey's work will catalyze an essential conversation about custody evaluations. I would strongly urge, however, that the conversation include an additional question that, in my view, is as fundamental as any that Kelly and Ramsey pose: the question of legitimacy. No one who has conducted or observed a custody evaluation or read an evaluator's report can deny that the custody evaluation process is extraordinarily intrusive. [n2] Parents subjected to an evaluation are interviewed at length, often about extremely personal matters, such as use of substances and sexual activity. Evaluators ask for, and routinely receive, the parents' consent [n3] to contact their children's physician, teacher, and babysitter. Neighbors and friends may also be called (again, with the parents' **[*305]** consent) if the evaluator concludes that they might offer useful information. Parents may be required to arrange a home visit or to have the evaluator observe them interacting with their child in some other setting. The process can be quite lengthy. [n4]

What justification must the state proffer in order to mandate such an extensive breach of personal privacy? This question is the focus of this article.

II. HUMAN SERVICE AS LEGAL MANDATE

Kelly and Ramsey are an interdisciplinary team, and they view custody evaluations both (and perhaps primarily) from a social science perspective and from a legal one. [n5] They describe the practice as "a human service that requires the expenditure of resources." [n6] This fact necessitates a systems-level analysis, they argue, because "ineffective human services create important opportunity costs, that is, the resources used for the ineffective service may have been spent in a more effective manner." [n7] This is, of course, an efficiency rationale. It suggests that custody evaluations may be a suboptimal--or even wasteful--use of what are almost certainly limited social service resources. It is important, Kelly and Ramsey argue, to assess whether this is the case.

A second rationale for the systems-level investigation is that custody evaluations "are ordered or sanctioned by governmental authority" [n8] and "there is a reasonable public policy expectation that we test for effectiveness of the human service." [n9] This statement is less clear. Arguably, it is also an efficiency-based rationale. The authors may be saying that government should compel an

individual to submit to a human service only if that service has been shown to be effective. This is a bit puzzling. It seems easy to agree with the *reverse* proposition--that is, that government should never mandate an ineffective service. But is efficacy alone a ground for a government mandate? To use a semi-facetious example, wouldn't that mean that, because we know proper weight control enhances health, the government should force overweight people to diet? In fact, the state has no general power to force individuals to submit to human service/therapeutic interventions, no matter how efficacious those interventions are believed to be. The state cannot, for example, automatically compel a mentally ill person to take medication--even medication known to be extremely effective in treating his disorder. [n10] In fact, individuals are generally forced to accept social service interventions only in two circumstances: when an individual is charged with or convicted of a crime or civil infraction [n11] or when an individual is requesting something from the government which is purely a matter of grace and not of entitlement.

Family law provides familiar examples of both types of mandated social service interventions. The child welfare system regularly compels parents to receive treatment of various kinds, or to participate in educational or other interventions, either as a condition of regaining custody of children placed in foster care or in order to avoid foster placement in the first place. [n12] While child welfare officials rarely press criminal charges against parents, [n13] civil abuse or neglect actions generally trigger a broad array of powers that can be exercised either by the courts or by the child welfare agency. [n14] At the other end of the spectrum, an individual wishing to adopt a child through a public agency (and, in some circumstances, via a private adoption as well) is routinely required to undergo an extensive "home study." [n15] But which rationale justifies the custody evaluation? As we add the question of legitimacy to the important questions already posed by Kelly and Ramsey, we will need to contend with threads of both privilege-based and harm-based justifications.

[*306] A. THE PRIVILEGE RATIONALE

Like adoption, divorce has often been described as a privilege and not a right. [n16] Professor Andrew Schepard, a leading and articulate advocate of family court activism, used the language of privilege in a 1992 article urging the adoption of mandatory parent education at divorce. Parents, Schepard said, should be compelled to participate in divorce-related education "before being granted a privilege by the state." [n17] "Like the license to drive a car," Schepard argues, "divorce is not a constitutional right." [n18]

There is certainly ammunition for Professor Schepard's claim. He quotes the U.S. Supreme Court's 1975 decision in *Sosna v. Iowa* (which itself quotes from an 1878 decision) to the effect that "the State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." [n19] Despite this seemingly sweeping language, however, the U.S. Supreme Court had already muddied the waters on this privilege/constitutional right point by holding just four years earlier, in *Boddie v. Connecticut,* [n20] that a state cannot, in fact, deny access to divorce to any class of its citizens. *Boddie* was an action by a group of welfare recipients who could not afford the $ 45 filing fee

required to initiate a Connecticut divorce. They argued that they were deprived of their constitutional rights without due process of law. Far from citing "privilege" and throwing out the plaintiffs' claim, the U. S. Supreme Court agreed with them. Though the Court did not employ the right/privilege distinction in its opinion, it used the related term "voluntary." The Court admitted that due process rights are generally asserted by defendants who find themselves in court involuntarily. There is no due process "right" of access to the courts by plaintiffs. The Court went on to say, however, that,

> although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. [n21]

In short, while divorce may be a privilege, it is a most unusual one; access to it is constitutionally protected. Admittedly, requiring a child custody evaluation does not bar a party from obtaining a divorce, and the analogy to *Boddie* is imperfect. But *Boddie* surely makes the privilege argument imperfect as well. Privilege arguments suggest, at their core, that, because the state need not provide a given benefit at all (e.g., adoption), it can burden access to that benefit in any way it sees fit without running afoul of the Constitution. [n22] *Boddie* makes it clear that, as to divorce, this is not the case, and relying on privilege to justify restrictions on access to divorce (i.e., holding up a divorce proceeding until the parties submit to a mandatory custody evaluation) is questionable.

A related point makes the privilege argument even more complicated in the twenty-first century context. The U.S. divorce rate peaked in the year 1981. [n23] Since that time, it has either remained flat or trended downward, depending on which of the warring demographers and sociologists one chooses to follow. [n24] During this period, however, the percentage of births to unmarried mothers has soared. [n25] Unlike divorce, nonmarital birth does not necessitate court intervention. However, the demographers seem to agree that cohabitation is a fragile state and, at least according to some researchers, is becoming more so. [n26] Given this, one **[*307]** might project that the custody cases of the twenty-first century will involve increasing numbers of unmarried parents and decreasing numbers of divorces. Indeed, figures from a single state, Massachusetts, already bear this out. Comparing figures from 1999 to those of 2007 shows that divorce filings were nearly flat over this period, increasing from 49,606 in 1999 to 50,575 in 2007. [n27] During this same period, however, cases involving unmarried parents increased 63%, from 25,840 filings in 1999 to 42,212 in 2007. [n28] This shift in the demographic profile of those using the family courts may have enormous implications, as I discuss further below. [n29] The present point, however, is a small one. Even if one could argue that divorce is a privilege and not a right, an unmarried parent's claim of access to his or her child is deeply embedded in the constitution. [n30]

Perhaps others will argue convincingly that, despite *Boddie* and *Stanley,* state courts may condition access to divorce--or to one's nonmarital children--on submission to extensive social service interventions. But this is an argument that should be made, not assumed.

B. THE HARM STANDARD

A second ground courts invoke to demand participation in human services and other therapeutic regimes is the need to avoid harm. This justification is also rumbling below the surface of the partial explanations offered for mandated interventions in the family court. Professor Andrew Schepard offers harm as a rationale for court mandates. For example, in the article in which he argues that divorce is a privilege, Professor Schepard also compares divorcing parents to drunk drivers, [n31] arguing that, like a drunk driver, a divorcing parent "should learn how to prevent harm to others from reoccurring." [n32] By viewing divorce as harm (or, at least, potential harm) to children, Professor Schepard brings coercive family court interventions under the umbrella used in the child welfare cases--that is, courts are empowered to act in order to prevent harm to children.

Unlike the scholarly void that Kelly and Ramsey identify in the custody evaluation literature, there is a plethora of literature on the impact of divorce on children, dating back more than thirty-five years to Goldstein, Freud, and Solnit's controversial (and nonempiri-cal) *Beyond the Best Interests of the Child.* [n33] In the thirty-six years since Goldstein, Freud, and Solnit's work appeared, a wealth of material, both clinical and empirical, has been published. The early clinical work was particularly shocking. Judith Wallerstein's studies, for example, suggested that, for at least some children, parental divorce has serious, long-term negative effects, especially if the child loses contact with one parent. [n34] Other researchers focused on the impact of the divorce process on children, arguing that children suffer greatly from intense and/or protracted parental conflict. [n35] Terms such as "trauma," "toxic," and "devastating" littered the scholarly publications on divorce, particularly the interdisciplinary literature. [n36] Divorce was portrayed as a psychological crisis for children in a literature that seemed uniformly grim. [n37]

Two other factors may have contributed to a growing sense that the assistance of mental health professionals, particularly those with expertise in child development, was needed in the family courts. One was the abandonment--often viewed as constitutionally compelled--of gender-based custodial preferences for mothers. [n38] The other was the steady growth of mental health professionals' participation in other courts. Taken together, the dire warnings of researchers, the newly vague legal standards, and the growing acceptance of mental health professionals in the courts may have converged, seeming to both permit and require the use of custody evaluations.

[*308] 1. The "Best Interests" Standard and the Uniform Marriage and Divorce Act (UMDA)

Until about 1970, most U.S. states, either by statute or judicial decision, employed an overt preference for mothers when parents disputed custody. [n39] During the 1970s and early 1980s,

however, these maternal preferences were replaced by "the purportedly gender neutral best-interests-of-the-child standard." [n40] Interestingly, "best interests," while it may have seemed new--and even progressive--had actually been around for decades, if not centuries. As early as 1881, the Kansas Supreme Court upheld a denial of custody to a father who tried to reclaim his daughter from other family members after a period of more than five years. "[A]bove all things," the Kansas Supreme Court said, "the paramount consideration is, what will promote the welfare of the child?" [n41] In 1925, the English Parliament passed the "Guardianship of Infants Act," [n42] which required a court deciding the custody of a child to "regard the welfare of the infant as the first and paramount consideration." [n43] And the 1952 version of the Missouri legislative code included a statute directing that state's courts to decide custody actions "only as the best interests of the child itself may seem to require." [n44]

In the early cases, the best interests standard most often applied if one of the claimants were a nonparent. Many courts used the best interests concept as Kansas had in 1881--to bar a parent's effort to reclaim a child after a lengthy period in the custody of a third party. Indeed, in a comprehensive 1964 law review article titled "Child Custody", [n45] Professors Henry H. Foster and Doris Jonas Freed include *only* third-party claims in the section they title "Best Interest of the Child." [n46]

This limited application of a best interests standard might, in fact, have been entirely consistent with the maternal preference standards that dominated American law before 1970. The two can be reconciled by assuming that the best interests of a child means awarding custody to the mother in disputes between the parents (unless she is unfit), but ordering custody "in the best interests of the child" when one of the claimants is a nonparent. The Official Comments to the UMDA, a model divorce statute approved by the National Conference of Commissioners on Uniform State Laws in 1970, [n47] seem to confirm this interpretation. Section 402 of the UMDA provides that in any state adopting the Act "[t]he court shall determine custody in accordance with the best interest of the child." [n48] No preference for either parent appears in the text of the section, but the original Comment by the Act's Reporters [n49] states the following: "This section . . . is designed to codify existing law in most jurisdictions . . . The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interests of children." [n50]

Of course, this interpretation of best interests became increasingly problematic as states began to declare maternal preferences unconstitutional. As growing numbers of state supreme courts and state legislatures overturned or revoked maternal preferences, judges assigned to custody cases found themselves with no starting point for their thinking. They could no longer begin with the assumption that custody should be assigned to the mother and then wait for proof to convince them otherwise (or fail to do so). Instead, judges were left with either vague, general directives [n51] or with a list of factors, often similar to those included in the UMDA. [n52]

The UMDA directs courts to consider five factors in deciding the custody of a child: (1) the

wishes of the parents; (2) the wishes of the child; (3) "the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest"; (4) "the child's adjustment to his home, school and **[*309]** community"; and (5) "the mental and physical health of all individuals involved." [n53] While the first two criteria may be factual, the third seems to focus on attachment or bonding (a major issue in the cases discussed by Goldstein, Freud, and Solnit, which often involved a child who had lived apart from her parents for some time), [n54] and the fourth on "adjustment," a psychological concept. [n55] The final criterion directs the judge to consider the mental (as well as physical) health of both parents and children. [n56]

Why did the UMDA adopt such psychologically oriented criteria for defining best interests? A not-very-comforting suggestion is, because everything else was taboo. Noting that "custody decisions based upon the level of material comfort in the competing households have been condemned in many jurisdictions," [n57] and continuing with other forbidden factors, such as the "social sophistication or educational level" of the parents, sexual preference, race, and religion, Professor Peggy Davis and Dr. Richard Dudley conclude that all that is left of best interests is *"psychological* best interest." [n58]

A somewhat less cynical view might note that Goldstein, Freud, and Solnit's *Beyond the Best Interests of the Child* was published in 1973. [n59] While this was three years after the NCCUSL approved the original draft of the UMDA, Goldstein, Freud, and Solnit's work was strongly foreshadowed by a 1963 *Yale Law Journal* note titled "Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties." [n60] This note articulated the "psychological parent" theory which became the centerpiece of the later book. In addition, Goldstein et al.'s title was no accident. The authors hoped and intended to influence the course of the law, through claims based on their interpretations of children's best psychological interests. [n61] In vivid terms, the authors portrayed the harm that might befall children deprived of their psychological parent. [n62]

Goldstein, Freud, and Solnit's work was highly controversial from the outset. By 1980, a group called the Committee on the Family, a section of the Group for the Advancement of Psychiatry, issued a report titled *Child Custody and the Family,* which took issue with most of Goldstein, Freud, and Solnit's assertions. [n63] The Group for the Advancement of Psychiatry concluded that there was "no evidence for the existence of a single 'psychological parent' with whom the tie is critically more important than with the rest of the network." [n64]

2. Mental Health Professionals in the Courts

From a legal and historical perspective, who was right about psychological parent theory is far less important than the real possibility that the public debate Goldstein, Freud, and Solnit spawned, and the influx of expert witnesses testifying for and against their theory, [n65] seemed to confirm courts' suspicion that best interests meant psychological best interests. But there was more. Writing in 1985, psychologists Deborah Karras and Kenneth K. Berry offer a further glimpse of part of the missing history of the custody evaluation. They state that

> [t]he role of the custody evaluator was not well-defined until the mid-1970s. Related to the increased reliance on mental health professionals in custody was the approval of the Uniform Marriage and Divorce Act model legislation in 1974. [n66] Among the custody practices proposed, the UMDA stipulated that courts can order a custody investigation that includes professional consultation. [n67]

Karras and Berry's reference is presumably to Section 405 of the UMDA, which states that "in contested custody proceedings, and other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child." [n68]

[*310] The section goes on to state that this report may be made by "the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for the purpose." [n69] The effect of this section, then, is to couple a *process* for obtaining psychological information with the seeming directive in Section 402 that such information is key to understanding the best interests of the child.

UMDA Section 405 seems to have provoked little comment. In part this may be because, by 1970, courts and mental health professionals had a long history of working together, to the extent, at times, of staffing courts with social workers, psychologists, and/or psychiatrists. The juvenile courts were an early model of this structure, [n70] but clearly not the only one. In 1937, a Behavior Clinic was established to serve several of the lower courts in Allegheny County, Pennsylvania. Among other tasks, this clinic provided presentencing reports in connection with criminal convictions. The clinic staff included three psychiatrists (one full time, one part time, and one on a consulting basis), a full-time psychologist, and two full-time psychiatric social workers. [n71] California created its Conciliation Courts in 1939 [n72] and professionalized their staffs in 1955. [n73] The original goal of the Conciliation Court was to "provide[] the opportunity for disagreeing partners to reassess the decision to divorce." [n74] In 1974, [n75] the Los Angeles County Conciliation Court "introduced a post-divorce counseling service for families returning to court for litigation arising from custody or visitation problems." [n76]

Section 405 of the UMDA seems to contemplate the use of such existing court-based mental health personnel to assist judges in custody cases. However, unlike juvenile cases, family cases were often scattered among several local and regional courts. [n77] It seems unlikely that many of these courts would have had mental health professionals on their staffs. Perhaps in recognition of this, Section 405 also clearly endorses retaining private agencies, presumably on a contract basis, to perform custody evaluations.

This is a powerful confluence: disturbing research, some of it directly urging judicial action; the replacement of probably outmoded, but clear, rules with vague standards seemingly rooted in psychology; and the direct endorsement in UMDA Section 405 of the practice of hiring outside consultants. Given all of this, it would be surprising if child psychologists and social workers failed

to offer new services to the legal system and if judges failed to ask them to do so. [n78]

None of this, however, indicates that any harm standard has been satisfied in the case of custody evaluations. The potential harm to a child whose parents have not resolved his custody is not only hard to quantify, it is hard to define. Is the harm the fact of the divorce? Of course, a custody evaluation will not change the fact that the divorce is occurring. Is the harm parental conflict? This is problematic as well. We might reasonably assume that low-conflict parents will rarely be subjected to custody evaluations, because they are the group most likely to resolve the issue of access to their children on their own. But research suggests a perverse relationship between parental conflict and child well-being. Data developed by Amato, Loomis, and Booth indicate that "children from high-conflict married families fared better following a divorce, but children from low-conflict married families were doing *worse* following the divorce." [n79] Is a custody evaluation needed for the high-conflict families, whose children already seem to do better once their parents separate? Or are we assuming that the harm that justifies a custody evaluation is the harm of conflict *directly induced by the divorce rather than preceding it?* But in what way does a custody evaluation decrease divorce-related parental conflict? If we cannot say that it does, is it legitimate to mandate this expensive, intensive intervention?

[*311] 3. Looking for Harm: The Kelly/Ramsey Research Agenda

In their article, Kelly and Ramsey suggest a number of hypotheses to be examined in assessing the merits of custody evaluations. They group these in three sets: court-related hypotheses, parent-related hypotheses, and child-related hypotheses. [n80] The authors may well be correct that all of these hypotheses are interesting and relevant if the goal is limited to measuring the impact of and possible benefits of custody evaluations. But if coerced custody evaluations must be justified--and on the kinds of grounds usually used required to justify coercion--several of the Kelly and Ramsey's hypotheses may fall by the wayside.

The court-related hypotheses seem particularly problematic. These would, if we turn them from investigations (Kelly and Ramsey's goal) to justifications (my concern), claim that it is permissible to coerce a high-level intrusion if the result is fewer trials, briefer trials, or judges who are happier with the records on which they base their decisions. While heavy judicial workloads are a serious matter, using them to coerce custody evaluations is unacceptable. That a process might be expedient does not justify coercion. The only court-related factor that might stand as a justification for a coerced evaluation would be the last, and only if it were restated. Perhaps a judge might feel that he or she could not make a rational decision in a case without a custody evaluation. But that way of stating the issue is quite troubling. It suggests the judge's complete reliance on the evaluator who, of course, is supposed to be supplying only a single piece of evidence.

Kelly and Ramsey also offer what they call parent-related hypotheses. They suggest that a custody evaluation might make parents more cooperative and less conflictual after the divorce and happier with the divorce's outcome. But do we allow the state to mandate social services because

the person being ordered to participate will be happy about it later? This does not seem to be the case. Viewed from the perspective of legitimacy, these parent perspectives really merge into the child-related hypotheses--something that Kelly and Ramsey in fact admit. [n81] That is, we might posit that children do better when a custody evaluation is performed and that they do better because the evaluation decreases the level of parental conflict, either by speeding up the process so that the conflict does not last as long or by encouraging parents to be more cooperative. These amount, in essence, to the same thing. In short, proving any of Kelly and Ramsey's hypotheses may demonstrate that custody evaluations have some positive effect. However, if limiting trials and promising parental satisfaction are inadequate to justify mandating participation in the custody evaluation process, then it is essential that the child-related benefits be proven. Indeed, it is essential to prove that, without custody evaluations, there is a significant risk of harm to children, which the evaluations allay. Anything less makes state coercion of evaluations extremely problematic.

C. THE VOLUNTARINESS DILEMMA

Interestingly, UMDA Section 405 states that a court may order a custody evaluation if "a parent or the child's custodian so requests." [n82] The provision does not appear to allow a court to order a custody evaluation in the absence of a parental request. Presumably, the request of *one* parent is sufficient for a court to order an evaluation, despite the objection of the other parent, [n83] but at least one parent (or custodian) must request the evaluation under Section 405 or no evaluation can be ordered. [n84]

As Kelly and Ramsey point out, no reported data indicate when and under what circumstances custody evaluations are ordered. [n85] Massachusetts, which keeps extensive **[*312]** statistics on cases in its probate and family courts, does not track the appointment of guardians ad litem who, in Massachusetts, work as custody evaluators. [n86] Anecdotal evidence suggests that the practice of appointing evaluators varies substantially by individual judge and by the judge's proximity to agencies offering custody evaluation services. [n87]

Do judges who appoint custody evaluators do so primarily, or solely, in response to requests from the parents? And, more importantly, are those requests, if made, truly voluntary? There is reason to fear they may not be.

The oxymoron "involuntary consent" is a topic of ongoing discussion in the child welfare arena. As one commentator wrote, "[t]he label voluntary often has little relevance to the realities of foster care placement or commitment to a mental institution . . . Voluntary placement of a child in foster care may be the functional equivalent of a 'plea bargain' negotiated to avoid the expenses and emotional distress involved in a state court neglect or abuse proceeding." [n88] For somewhat different reasons, we need to carefully question the voluntariness of consents to custody evaluations.

Anecdotal evidence provided by the CFFC staff [n89] suggests that the vast majority of the

custody evaluations they perform are "voluntary"; they are requested by the lawyer for one of the parents. [n90] The other parent is then asked if he/she agrees to the evaluation. [n91] Anecdotal evidence suggests that this agreement is virtually always forthcoming.

Is this a voluntary process? Why might a lawyer recommend that his/her client submit to a custody evaluation? The lawyer might believe that the evaluation will help to settle the case. Or the lawyer could feel that the evaluation will place his/her client in a favorable light (or the other parent in an unfavorable light), thus strengthening the client's hand either in settlement negotiations or at trial. But what of the other lawyer? If that lawyer feels that the case is unlikely to settle, or that a custody evaluation may be unfavorable to his/her client, should the lawyer advise the client to refuse to participate? This may be a perilous position for the client to take--at least to the extent that family court judges are versed in the parental conflict literature. A judge who has read about--or heard expert testimony about--the dangers to children from parental conflict might be particularly attuned to indications that a parent is being uncooperative, stubborn, or conflictual. [n92] Because such a parent arguably harms his or her child, the judge might form a tentative conclusion that this parent is not placing the child's interests ahead of his or her own. [n93] Many lawyers will be leery of having their client take the risk of seeming self-absorbed or uncooperative. Even when the client is extremely unhappy about submitting to the custody evaluation, the lawyer may strongly urge him or her to do so. Is such a consent voluntary?

Other divorcing or separating parents will not have counsel. Indeed, the number of self-represented divorcing parents is exploding. [n94] Might the consent of an unrepresented litigant be even less voluntary than that of the litigant who has counsel? Will those judges who find custody evaluations useful be more likely to order them, without request, in these pro se cases?

In sum, if the justification for custody evaluations is that they are voluntary, we have an obligation to examine what voluntary means. It is clear that in some legal arenas, the term can be stretched beyond recognition. [n95]

D. CUSTODY EVALUATIONS AND THE NEW FAMILY COURT DEMOGRAPHY

During the past several decades, family courts have greatly increased the number and types of mandated interventions imposed on parties disputing the custody of their children. **[*313]** From custody evaluations to mandatory mediation to mandated parent education, parenting coordination, and more, family courts have taken on a strongly interventionist character. And they have done so at a time when the demographic profile of the litigants before them has shifted fairly dramatically. This new demography of the family court may seem to some to call for ever more interventions. But surely it also cautions that the litigants with the fewest resources are those most easily compelled to accept social services they might prefer to reject.

This changing demography of family court litigants has multiple parts. A key aspect, described above, is the stunning increase in nonmarital births. As recently as 1980, births to unmarried women

accounted for just 18.4% of all births in the United States [n96] Over the next twenty-six years, they soared to 38.5% of all births, [n97] the highest percentage ever recorded. [n98] As was noted above, having a nonmarital child (unlike deciding to divorce) does not inherently involve the courts. [n99] However, unmarried parents, unlike their married counterparts, often do not live together, which may generate a need for a child support order. [n100] Other unmarried parents may be cohabiting at the time of their child's birth, but they may later separate and may disagree about the future care of their child. Demographers studying nonmarital cohabitation tell us both that the percentage of nonmarital children being born to cohabiting couples is increasing [n101] and that the rate of cohabitation disruption is increasing as well. [n102] This data is preliminary, and the famous "50% divorce rate" controversy certainly argues for caution in interpreting it. It is clear, however, that more children are being born to unmarried parents, and in at least one state, Massachusetts, the number of unmarried parents in the family courts has swelled, even as divorce has stayed flat or trended downward. [n103]

What do we know about unmarried parents? We know that nonmarital childbearing in the United States is highly stratified by education. [n104] Of the more than one million unmarried women who give birth each year, only 20% have attended college, and fewer than 5% have a college degree. [n105] By contrast, in the overall population, 33% of women held a college degree in 2007. [n106] While educated women do give birth while unmarried, they account for only a very small portion of the unmarried parent population. [n107] As a group, unmarried parents have less than average educational attainment.

Divorce may seem like a more equal opportunity event, but demographers and sociologists have recently identified a so-called "education gap" here too. [n108] Since 1981, when the divorce rate peaked, it has fallen for college graduates, but *increased* for those with only a high school education. [n109] Indeed, Professor Stephen Martin of the University of Maryland, the researcher generally credited with discovering this "education gap," states in his most recent work on the topic that "marital dissolution rates for less educated women are clearly rising; their marriages are becoming more unstable even as marriages become more stable for highly educated women." [n110] Sociologist David Popenoe writes that

> [p]eople who have completed college (around a quarter of the population) tend to have significantly higher marriage and lower divorce rates compared to those with less education. Among those married in the early 1990's, for example, only 16.5 percent of college educated women were divorced within ten years, compared to 46 percent for high school dropouts. Indeed, most of the recent divorce rate decline has been among the college educated; for those with less than a high school education, the divorce rate has actually been rising. [n111]

Assuming that Martin, Popenoe, and others who have adopted their findings are correct, the demographic portrait of the divorcing population increasingly resembles that of the unmarried parent population. It is a group that is clustered at the lower end of the educational spectrum.

Because the link between education and earnings is strong in the United States, [n112] this is also a group with fewer economic resources. In short, the population in the **[*314]** family court should, on the basis of this demographic data, be shifting downward in both educational attainment and economic resources.

III. CONCLUSION

Kelly and Ramsey have turned the conversation about custody evaluations in a new direction. Moving beyond "how to," they insist that a systems-level analysis of the costs and benefits of this intervention is overdue. I have added to their agenda (at some length, I fear) to suggest something more. Whatever we may ultimately learn about their efficacy and value, custody evaluations are an extraordinary breach of personal privacy. An evaluator asks what can be embarrassing questions, comments on the quality of a person's parenting, and quizzes the person's doctor, the child's teacher, the family's relatives, and neighbors. Undeniably, there are times when privacy must give way to some greater necessity. In this article, I argue that proving that greater necessity should be added to the agenda that Kelly and Ramsey set out.

Challenging the legal system to justify its use of custody evaluations becomes even more compelling if, as the demographers warn, the population using the family courts is increasingly composed of poorer and less educated individuals. [n113] There is an eerie overtone here of child welfare arguments. Parents who come into contact with child welfare agencies are, almost without exception, poorly educated and impecunious. [n114] They are offered an array of social services from foster care to drug treatment to parenting classes. [n115] One might argue that they are a particularly fortunate group to be given all these resources. In fact, however, we are all aware of the tense relationship between child welfare clients and the state and the constant claims of state overreaching. One need not be a hopeless cynic to fear that, when a group interacting with a state agency, whether a child welfare department or a family court and its associated social services, is largely poor and poorly educated, the possibilities for state overreaching--however well meaning--multiply. If it is true that the demographic profile of family court litigants is shifting downward in both income and educational attainment, then the need to carefully monitor and appropriately constrain both the courts and their agents becomes greater, not less.

This is a challenge to the family courts of the second decade of the twenty-first century. It is not an argument for a return to "the adversary system" [n116] or the abandonment of all of the many new limbs the family court has grown in the past three decades. It is a call, however, to recognize more directly that all of these interventions are intrusions into the privacy and, at times, the wallets of people who come to the family court to terminate a marriage or to formalize the care of a nonmarital child. No matter how well intentioned a court may be, it exercises the coercive power of the state. That power is properly exercised only when it is checked and balanced. With more pro se litigants who are poorer and less educated, the checks and balances we traditionally assumed have grown weaker. Surely it is time to reassess the many interventions that contemporary courts order and to think anew about the justifications for ordering them.

I end by suspecting that some might make an analogy to the juvenile courts and the effect on them of the U.S. Supreme Court's 1967 decision in *In re Gault.* [n117] *Gault* is the case in which the Court held that certain freewheeling practices in the juvenile courts were constitutionally impermissible. As we discuss *Gault* with our students, law professors always ask whether *Gault* was a boon or a club for juveniles. Since the *Gault* decision, juveniles have had more rights but they have also been far more likely to be prosecuted **[*315]** and treated as criminals. [n118] In the course of this conversation, it becomes easy to forget that Gerry Gault was sentenced to five years of confinement in a juvenile detention facility for making an obscene phone call. [n119] While events since *Gault* may have taken us in the wrong direction, the Court's conclusion that no coercive system, however benign its motives, should escape scrutiny and the need for justification is difficult to fault. As family courts continue to evolve, and as activists call for increasing social service interventions, it will be important to ensure that the checks and balances essential to any coercive system are firmly in place.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionParentageFamily LawChild CustodyAwardsStandardsBest Interests of Child

FOOTNOTES:

n1 This is a social science term that is a bit obscure to the legal reader. I assume it means examining the overall impact of the practice of ordering and using custody evaluations, rather than focusing on the quality of individual evaluations and evaluation techniques. That is, it would assess custody evaluations on the macro, rather than the micro, level.

n2 I had the great privilege of being appointed a Visiting Scholar at the University of Massachusetts Medical School in Worcester, Massachusetts, during the 2006-2007 academic year. During that year, I held the title of "Visiting Professor of Psychiatry" and was assigned to the Child and Family Forensic Center (CFFC), which is part of that Department. The Center is staffed by three psychologists and a clinical social worker. Three of the four are full time. During my tenure as a Visiting Scholar, I was able to observe parent interviews and

parent/ child interactions, I was shown the psychological tests that are sometimes administered, and I was able to be in the room while collateral contact telephone calls were made. The professional staff of CFFC included me in case conferences and patiently answered my many questions. It was an extraordinary opportunity to observe the custody evaluation process in the hands of dedicated, capable and highly ethical practitioners. That I come away from that experience with many doubts and reservations about custody evaluations has to do, as I hope this comment makes clear, with the limits of the law, and not with the skill of those whom I observed.

n3 As to whether this "consent" legitimates the process, see *infra* pp. 311-12.

n4 The interviews with adults that I observed regularly lasted one to two hours. Sometimes more than one interview was conducted with an individual. Interviews of younger children tended to be much shorter. At the request of the clinical staff, I did not observe any interviews with teenagers. Overall, it took at least several weeks for a full evaluation to be completed, and if the parties were less than entirely cooperative in setting up home visits or interviews, it could easily take months, despite the evaluator's diligence.

n5 Robert F. Kelly is a Professor of Sociology at LeMoyne College. Sarah H. Ramsey is the Laura J. and L. Douglas Meredith Professor for Teaching Excellence at Syracuse University School of Law.

n6 Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments,* 47 FAM. CT. REV. 286 (2009).

n7 *Id.*

n8 *Id.*

n9 *Id.*

n10 See, for example, the discussion in *In re Qawi,* 81 P.3d 224 (Cal. 2004), which involved a mentally disordered criminal defendant. The case is discussed in Erin Williams, *Patient Rights: Mentally Disordered Offenders May Refuse Medication,* 32 J. L. MED. & ETHICS 375 (2004).

n11 And even here there are limits, which is what the case and article cited in the note above discuss. The fact that an individual has been convicted of a crime does not necessarily mean that she can be forced to submit to services/treatment.

n12 See, for example, the description of the New York process in Subha Lembach, *The Right to Legal Representation at Service Plan Reviews in New York State,* 6 U.C. DAVIS J. JUV. L. & POL'Y 141 (2002).

n13 *See, e.g.,* Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings,* 35 U. LOUISVILLE J. FAM. L. 239, 325 (1996-97). Sprague and Hardin note that few cases are referred from the child welfare system to the criminal system.

n14 *See, e.g.,* Sandra Anderson Garcia & Robert Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings,* 22 GA. L. REV. 1079 (1988).

n15 There is widespread agreement that the adoption review process is extremely intrusive. *See generally* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993); *see also* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples,* 95 MICH. L. REV. 447, 466 (1996). Reports in the popular press sometimes use the term "humiliating" to describe "questions about [the potential adoptees'] sex lives and seemingly random trivia from their pasts, like why did [one party's] father change jobs 30 years ago." Katrina Onstad, *Bursting the Chinese Baby Bubble,* MACLEAN'S, May 7, 2008.

n16 *See, e.g.,* LeFebvre v. LeFebvre, 510 S.W.2d 29, 30 (Tex. App. 1974). *LeFebvre* challenged the Texas residency requirement, that is, the rule that a person must be a resident of Texas for one year before filing for divorce. Holding that "divorce is a privilege," the Texas Civil Court of Appeals upheld the statute. *LeFebvre,* 510 S.W.2d at 30. An interesting discussion of divorce as a privilege from an historian's perspective can be found in Katherine L. Caldwell, *Not Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State,* 23 LAW & SOC. INQUIRY 1 (1998).

n17 Andrew Schepard et al., *Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility,* 16 NOVA L. REV. 767, 775 (1992).

n18 *Id.* at 774.

n19 Sosna v. Iowa, 419 U.S. 393, 404 (1975) (quoting Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878)). *Sosna* was also an unsuccessful challenge to a state's divorce residency requirement. *See LeFebrve,* 510 S.W.2d 29.

n20 401 U.S. 371 (1971).

n21 *Id.* at 376-77.

n22 The U.S. Supreme Court has discussed the relationship between privilege and conditions on a number of occasions. In *W. & S. Life Ins. Co.v. State Bd. of Equalization,* 451 U.S. 648, 658 (1981), the court noted that "[i]f a State cannot impose unconstitutional conditions on the grant of a privilege, then its right to withhold the privilege is less than absolute. But if the State's right to withhold the privilege is absolute, then no one has the right to challenge the terms under which the State chooses to exercise that right." In the current context, if divorce cannot be withheld, then it is not purely a privilege, and there is a limit to the ways in which access to it can be constrained. Conversely, if divorce is a privilege that the state is entirely

free to withhold, then any limitation on its exercise should be permissible.

n23 Sally C. Clarke, *Advance Report of Final Divorce Statistics, 1989 and 1990,* 43 MONTHLY VITAL STAT. REP. 1 (1995), *available at* http://www.cdc.gov/nchs/data/mvsr/supp/mv43_09s.pdf.

n24 For the assertion that divorce rates have leveled off but are not falling, see the work of demographer Larry L. Bumpass, in particular, R. Kelly Raley & Larry Bumpass, *The Topography of the Divorce Plateau: Levels and Trends in Union Stability in the United States after 1980,* 8 DEMOGRAPHIC RESEARCH 245, 245 (2003). For data indicating a significant decline in divorces since the 1980s, see THE NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2007: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 19, *available at* http://marriage.rutgers.edu/Publications/SOOU/SOOU2007.pdf.

n25 The trend has not been entirely upward, however. The out of wedlock birth rate actually stabilized from the mid 1990s to 2002, when it suddenly resumed its upward trajectory. *Compare* Bill O'Hare, *The Rise--and Fall?--of Single-Parent Families, available at* http://www.prb.org/Articles/2001/TheRiseandFallofSingleParentFamilies. aspx, *with* Brady E. Hamilton et al., *Births: Preliminary Data for 2006,* 56 NAT'L VITAL STAT. REP. 1, 2-4 (2007).

n26 *See* Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States,* 54 POPULATION STUD. 29 (2000).

n27 Personal communication with Ilene Mitchell, Case Manager, Administrative Office of the Massachusetts Probate and Family Courts, in Boston, Mass. (Mar. 11, 2008).

n28 *Id.*

n29 *See infra* notes 83-98 and accompanying test.

n30 Stanley v. Illinois, 405 U.S. 645 (1972). *Stanley* held that the State of Illinois could not treat a father as conclusively unfit on the sole ground that he was not married to the mother of his children. *Stanley* thus established that all parents, married or unmarried, have a constitutional right of access to their children which a state may not abridge without due process of law.

n31 Schepard et al., *supra* note 17, at 775.

n32 *Id.*

n33 JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973). This was not, of course, the first work to discuss the impact of divorce on children--nor is Goldstein, Freud, and Solnit's work limited to divorce. Earlier, if less influential, pieces can easily be found. *See, e.g.,* James S. Plant, *The Psychiatrist Views Children of Divorced Parents,* 10 LAW & CONTEMP. PROBS. 807 (1944).

n34 JUDITH WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE, WHO WINS, WHO LOSES AND WHY (1989).

n35 See, for example, the work of Dr. Paul Amato. Though Amato's major book on parental conflict was not published until 1997, his work appears in professional journals beginning nearly a decade earlier. *See, e.g.,* Paul R. Amato & Alan Booth, *Consequences of Parental Divorce and Marital Unhappiness for Adult Well-Being,* 69 Soc. FORCES 895 (1991); *see also* PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997).

n36 *See, e.g.,* Schepard et al., *supra* note 17; Barry Bricklin & Gail Elliot, *Qualifications of and Techniques to be Used by Judges, Attorneys, and Mental Health Professionals Who Deal with Children in High Conflict Divorce Cases,* 22 U. ARK. LITTLE ROCK L. REV. 501, 522 (2000) (warning against possible "toxic trade offs" in choosing between custodial parents); Rhonda Freeman, *Parenting After Divorce: Using Research to Inform Decision-Making About Children,* 15 CAN. J. FAM. L. 79, 108 (1998) (warning that "parental alienation" can be "toxic," rendering a change in a child's custody impossible); JoAnne Pedro-Carroll et al., *Assisting Children through Transition: Helping Parents Protect Their Children from the Toxic Effects of Ongoing Conflict in the Aftermath of Divorce,* 39 FAM. CT. REV. 377 (2001); W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation,* 45 FAM. CT. REV. 193, 194 (2007) (arguing that

"contested custody litigation is corrosive to parents and toxic to children"); H. Patrick Stern et al., *Professionals' Perceptions of Divorce Involving Children,* 22 U. ARK. LITTLE ROCK L. REV. 593, 594 (2000) (commenting on the "potentially devastating" effects on children of the "epidemic of divorce"); Anita R. White, *Mediation in Child Custody Disputes and a Look at Louisiana,* 50 LA. L. REV. 1111, 1130 (1990) ("An awareness of the devastating effects divorce can have on children may be the necessary first step toward allowing the parents to separate the issues of custody from the anger the parents may feel toward each other . . .").

n37 Psychologist Robert Emery offers a persuasive explanation for what seems to be dichotomous thinking in the more recent literature on children and divorce. Emery notes that, "[c]linical reports tend to highlight children's struggles in coping with parental divorce, while research studies tend to highlight children's strengths. The clinical literature often concludes that divorce is devastating for children, which it is in many ways. Yet the tight focus on children's inner life can cause clinicians to overlook the broader view, that is, children's successful coping with parental divorce despite their pain. In contrast, empirical research uses a wide-angle lens that portrays an accurate image of the successful adjustment of most children following a parental divorce, but the broad portrait fails to capture the fine texture of pain that is evident in a clinical close-up." Robert E. Emery, *Postdivorce Family Life for Children: An Overview of Research and Some Implications for Policy, in* Ross A. THOMPSON & PAUL R. AMATO, THE POSTDIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY 17 (1999).

n38 No challenge to maternal custodial preferences has ever reached the U.S. Supreme Court, but a number of state courts have held such preferences unconstitutional, relying either on the Equal Protection Clause of the federal Constitution, or on the equal rights amendments to their state constitutions. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 2007: CASES AND MATERIALS 729 (3d ed. 2006). The most frequently cited case is Devine v. Devine, 398 So. 2d 686 (Ala. 1981). Even when no decision of a state's high court declared the maternal presumption unconstitutional, many state legislatures nonetheless abandoned it. *See, e.g.,* Doris Jonas Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview,* 14 FAM. L.Q. 229, 263 (1981). The California legislature repealed its maternal preference in 1972 (Cal. Act of Aug. 12, 1972, ch. 1007 § 1, 1972 CAL. STAT. 1854-1855). It was the first state to do so, but others were quick to follow. *See* Mary Ann Mason, *Motherhood v. Equal Treatment,* 29 J. FAM. L. 1, 20-21 (1990-1991).

n39 WEISBERG & APPLETON, *supra* note 38.

n40 *Id.*

n41 Chapsky v. Wood, 26 Kan. 650, 653-54 (1881).

n42 15 & 16 Geo. 5, c. 45, § 1 (1925) (Eng.).

n43 *Id.* Henry H. Foster, Jr. & Doris Jonas Freed, *Child Custody (Part I),* 39 N.Y.U. L. REV. 423, 424 (1964) (citing 15 & 16 Geo. 5, *c.* 45, § 1 (1925) (Eng.)).

n44 Foster & Freed, *supra* note 43, at 438 (citing Mo. Stat. Ann. § 452.120 (1952)).

n45 *Id.*

n46 *See id.* at 435-37. Much of the discussion in Goldstein, Freud and Solnit's book also centers on third party actions, particularly long term foster care placements. *See* GOLDSTEIN ET AL., *supra* note 33.

n47 The statute's text can be found at 9A U.L.A. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a nonprofit, unincorporated association that "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law." NCCUSL includes representatives from each of the fifty states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands. *See* Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, http://www.nccusl.org. The group is over 100 years old and has proposed model legislation in fields ranging from marriage and the family to commercial law.

n48 UMDA § 402, 9A U.L.A. 282 (1998).

n49 In preparing a model act, the NCCUSL hires one or more Reporters, whose task is to conduct research, prepare drafts, and revise the drafts in accordance with the directives of the Commissioners. *See* Robert J. Levy, *A Reminiscence about the Uniform Marriage and Divorce Act--and Some Reflections about Its Critics and Its Policies,* 1991 B.Y.U. L. REV. 43, 47-48 (1991). Professor Levy, one of two Reporters for the UMDA, points out in this article that there was substantial disagreement among the Commissioners, and between the Commissioners and Reporters, on the issue of maternal preference.

n50 *Id.* at 49 n.18.

n51 *See,* e.g., MASS. GEN. LAWS c.208, § 28 "Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain or may award their custody to some third person if it seems expedient or for the benefit of the children . . ."

n52 The UMDA was ultimately adopted in only 8 states, but it is regularly referred to as a catalyst for family law reform even in the many states that did not elect to adopt the statute. *See, e.g.,* Levy, *supra* note 49.

n53 UMDA § 402, 9A U.L.A. 282 (1998).

n54 GOLDSTEIN ET AL., *supra* note 33.

n55 UMDA § 402, 9A U.L.A. 282 (1998).

n56 *Id.*

n57 Peggy C. Davis & Richard G. Dudley, *Family Evaluation and the Development of Standards for Child Custody Determination.* 19 COLUM. J. L. & SOC. PROBS. 505, 512-13 (1985).

n58 *Id.*

n59 GOLDSTEIN ET AL., *supra* note 33.

n60 Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties,* 73 YALE L. J. 151 (1963). Goldstein and Freud were both based at Yale; he in the law school and she in the Yale Child Study Center.

n61 Professor Peggy Davis wrote of the Goldstein, Freud, and Solnit book that "the authors apparently believed the evils of prevailing child placement policies too great and too urgent to await a legislative remedy. They announced that the principles advanced were 'intended to provide a basis for critically evaluating *and revising the procedure and substance of court decisions,* as well as statutes.' " Peggy C. Davis, *"There is a Book Out . . ." An Analysis of Judicial Absorption of Legislative Facts,* 100 HARV. L. REV. 1539, 1544 (1987).

n62 GOLDSTEIN, FREUD & SOLNIT, *supra* note 33, at 31-34.

n63 Davis, *supra* note 61, at 1546.

n64 *Id.* This report and the impact of the Goldstein, Freud, and Solnit book are discussed at length by Davis.

n65 *See id.*

n66 There may appear to be a date discrepancy here, but there is not. The NCCUSL approved the UMDA in 1970. *See* Levy, *supra* note 49, at 43. However, the Act did not receive the endorsement of the Family Law Section of the American Bar Association until after a number of redrafts. This took until 1974, the date cited by Karras and Berry. The history of the statute's difficult birth is recounted in LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES 269 (1980).

n67 Deborah Karras & Kenneth K. Berry, *Custody Evaluations: A Critical Review,* 16 PROF. PSYCH: RES. & PRAC. 76, 76 (1985).

n68 UMDA § 405(a), 9A U.L.A. 282 (1998).

n69 *Id.*

n70 For a brief overview by a mental health professional with strong interdisciplinary credentials, see Randy K. Otto, *Considerations in the Assessment of Competent to Proceed in Juvenile Court,* 34 N. KY. L. REV. 323 (2007). A classic work is ALFRED J. KAHN, A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CHILDREN'S COURT (1953).

n71 *See* Note, *The Family in the Courts: A Study of Domestic Relations Jurisdiction in Allegheny County and the Desirability of an Integrated Family Court,* 17 U. PITT. L. REV. 206 (1956).

n72 *See* 1939 Cal. Stat. 2261-2264.

n73 *See* Meyer Elkin, *Concilation Courts: The Reintegration of Disintegrating Families,* 22 FAM. COORDINATOR 63, 65 (1973). Mr. Elkin served as Director of Family Counseling Services for the Conciliation Court of Los Angeles County.

n74 Helga Sitkin, *The California Conciliation Court: An Interdiscipline Effort to Promote Matrimony,* 2 GLENDALE L. REV. 31, 32 (1977-1978); *see also* James Crenshaw, *A Blueprint for Marriage: Psychology and Law Join Forces,* 48 A.B.A. J. 125 (1962).

n75 This is five years after California adopted the country's first no fault divorce statute (Family Law Act of 1969, now codified as amended at CAL. CIV. CODE § 43.5 et seq. (2008)) and during a period of skyrocketing divorce rates nationally. *See* ALEXANDER A. PLATERIS, DIVORCES AND DIVORCE RATES (1978), *available at* http://www.cdc.gov/nchs/data/series/sr_21/sr21_029.pdf.

n76 Sitkin, *supra* note 74, at 36.

n77 *See* Note, *supra* note 71, for the extreme example offered by Pennsylvania.

n78 In a work in progress, I am piecing together some of the stories of early custody evaluators in Massachusetts. The late, controversial Richard Gardner appears to have been a major actor in the founding of this field. *See* RICHARD A. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION (1982).

n79 As noted in Emery, *supra* note 37, at 12.

n80 Kelly & Ramsey, *supra* note 6, at 293-95.

n81 *Id.* at 293-96.

n82 UMDA § 405(a), 9A U.L.A. 386 (1998).

n83 This seems to be the way the Conciliation Courts worked, at least in the days when their primary goal was marriage counseling. If one spouse requested counseling, the other could be subpoenaed to appear at the counseling session. In fact, third parties could also be subpoenaed. Helga Sitkin's work discusses subpoenas used in cases of adultery to compel the spouse's paramour to participate in the counseling! *See* Sitkin, *supra* note 74, at 34.

n84 UMDA § 405(a), 9A U.L.A. 386 (1998).

n85 Kelly & Ramsey, *supra* note 6, at 290.

n86 Personal communication with Ilene Mitchell, Case Manager, Probate and Family Court Administrative Office, Boston, Mass. (Mar. 3, 2008).

n87 I conduct a seminar for the Massachusetts Probate and Family Court judges as part of their annual Haskell Freedman Retreat. At the 2007 retreat, I asked the judges about their practices in appointing evaluators. Some of the judges indicated that they *never* appoint an evaluator; others that they do so frequently. There seemed to be a geographical split, with judges located near major academic centers doing substantial appointing, and those in rural settings doing little or none.

n88 Sarah C. Kellogg, Note, *The Due Process Right to a Safe and Humane Environment for Patients in State Custody: The Voluntary/Involuntary Distinction,* 23 AM. J. LAW & MED. 339, 357 (1997), *quoting* Christina Chi-Young Chou, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety,* 46 VAND. L. REV. 683 (1993); *see also* Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change,* 65 TENN. L. REV. 835 (1998).

n89 *See supra* note 2.

n90 *Id.*

n91 *Id.*

n92 This problem is greatly exacerbated in states with a so-called "friendly parent" laws. These statutes instruct courts deciding custody disputes to favor the parent most likely to encourage the child's continuing and frequent contact with the other parent. *See* Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody,* 45 OHIO ST. L.J. 455, 476 (1984).

n93 Variations on the phrase "to place the child's interests above his or her own" are frequently repeated in the child custody literature. *See, e.g.,* Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions,* 5 YALE L. & POL'Y REV. 267, 281 (1987).

n94 In Arizona, for example, an estimated 70-80% of litigants in the family court do not have counsel. Mark W. Armstrong, *The New Arizona Rules of Family Law Procedure,* 42 AZ. ATTY 30, 30 (2006). New Hampshire also reports a very high incidence of pro se litigants. "The New Hampshire Supreme Court Task Force on Self-Representation . . . reported . . . 'one party [proceeding] pro se in 85% of all civil cases in the district court and 48% of all civil cases in the superior court.'" Nina Ingwer VanWormer, *Help At Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon,* 60 VAND. L. REV. 983, 990 (2007). In Colorado domestic relations cases, the proportion of *pro se* litigants rose to 55.7% by 1999. *Id.* at 991. A 2002 California study showed a state mean of 67% of litigants appearing without counsel. JUD. COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 87 (2004), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf; *see* Leslie Feitz, *Family Law in the Twenty-First Century: Comment: Pro Se Litigants in Domestic Relations Cases,* 21 J. AM. ACAD. MATRIMONIAL L. 193 (2008).

n95 The *Boddie* Court, of course, focused on the lack of voluntariness that is inherent in the divorce process because of the state monopoly on divorce. *See supra* notes 20-21.

n96 *See* Childstats.gov, Births to Unmarried Woman: Percentage of All Births That Are to Unmarried Women by Age of Mother, 1980-2006 *available at* http://www.childstats.gov/americaschildren/tables/fam2b.asp.

n97 *Id.*

n98 *See* Hamilton et al., *supra* note 25.

n99 Indeed, legislation has been enacted on both the state and federal levels to make the process of legally acknowledging a nonmarital child both simple and nonjudicial. *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, 42 U.S.C. § 666(a)(5)(C)(ii) (2008). This statute requires states participating in the federal welfare system to create an expedited process to establish the paternity of nonmarital children.

n100 This too can be handled by consent, though it often is not.

n101 Demographers Larry Bumpass and Hsien-Hen Lu studied groups of unmarried parents at two periods: 1980-1984 and 1990-1994. They found that the earlier cohort accounted for 29% of all nonmarital births during the period, while the later cohort accounted for 39%. Bumpass & Lu, *supra* note 26.

n102 Bumpass and Lu note "the substantial increase in the instability of unions . . . despite the plateau in the US divorce rate . . . This decreasing stability results from a decline in the proportion [of cohabitants] who marry their cohabiting partner (from 60 to 53 per cent over [the period studied])." Bumpass & Lu, *supra* note 26, at 33.

n103 Personal communication with Ilene Mitchell, *supra* note 27.

n104 *See* Margaret L. Usdansky & Sara S. McLanahan, *Looking for Murphy Brown: An Analysis of College Educated, Single Mothers, available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/l/0/7/3/7/pages107378/p107378-1.php.

n105 *Id.* at 1.

n106 Press Release, U.S. Census Bureau, One-Third of Young Women Have Bachelor's Degrees (Jan. 10, 2008), *available at* http://www.census.gov/Press-Release/www/releases/archives/education/011196.html.

n107 *See* Usdansky & McLanahan, *supra* note 104.

n108 Steven P. Martin, *Trends in Marital Dissolution by Women's Education in the United States,* 15 DEMOGRAPHIC RES. 537 (2006).

n109 A nice description of this phenomenon in the general press can be found in David Brooks, *The Education Gap,* N. Y. TIMES, Sept. 25, 2005.

n110 Martin, *supra* note 108.

n111 THE NAT'L MARRIAGE PROJECT, *supra* note 24.

n112 See, for example, the chart published by the U.S. DEPT. OF LAB., BUREAU OF LAB. STAT. (2007), *available at* http://www.bls.gov/emp/emptab7.htm, showing median

weekly earnings of $ 604 for a high school graduate and $ 987 for the holder of a bachelor's degree.

n113 Of course, if the demographers are right, the problem (if, indeed, it is one) of mandated custody evaluations may solve itself. As the CFFC staff made clear during my visiting year, custody evaluations are quite expensive. If litigants cannot afford to pay for an evaluation, and if a court has no budget to tap, the evaluation will simply not be ordered, whatever its efficacy and value.

n114 See, for example, the discussion of the residual model of child welfare in DUNCAN LINDSEY, THE WELFARE OF CHILDREN 107-110 (2004).

n115 *Id.*

n116 It has been most interesting to see that many of the comments published just as no-fault divorce was being adopted assumed that we had, in fact, left the adversary system behind. And, of course, to a great extent, we have. "While it would be naive to believe that statutory enactments can eliminate all rancor and acrimony in marital disputes, the elimination of fault and the limitation of the adversary activity has materially assisted." Elkin, *supra* note 73, at 69.

n117 *Application of Gault,* 387 U.S. 1 (1967).

n118 *See, e.g.,* JOAN MCCORD ET. AL., JUVENILE CRIME, JUVENILE JUSTICE: PANEL ON JUVENILE CRIME, PREVENTION, TREATMENT, AND CONTROL (2001).

n119 Or for being present while a phone call was made. This fact was never made clear in the *Gault* proceedings.

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